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774-057—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1075

WILLIAM J. BRUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–5a) is reported at 338 F. 2d 427. The findings, conclusions and judgment of the district court (Pet. App. 6a–11a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1964. A timely petition for rehearing was denied on January 19, 1965. The petition for a writ of certiorari was filed on April 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States may be held liable under the Federal Tort Claims Act for the negligence of a person who is not its employee and who was not, either intentionally or negligently, made to appear to be a federal employee.

2. Whether "ostensible agency" principles of State law govern the determination of who is a federal employee for purposes of the Federal Tort Claims Act.

STATUTE INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, provides in pertinent part:

> § 1346(b). Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
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> * * * * * *
>
> § 2671. *Definitions*
>
> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the

United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

STATEMENT

1. The facts found by the district court (Pet. App. 6a–9a) and sustained by the court of appeals (Pet. App. 1a, 3a–5a) are not disputed here. They may be briefly summarized:

The Castle Air Force Base Aero Club was organized and operated as an instrumentality of the United States primarily for the purpose of providing an opportunity for Air Force personnel and their dependents to engage in flying as a recreational activity and thereby to encourage the development of aeronautical skills. Membership in the club was voluntary and was open to civilian employees and to active and retired military personnel and their dependents. The club had its own constitution and by-laws, and it was designed to be self-governing and financially self-supporting. Members of the club participated in its activities only while they were off duty. In addition to paying initiation fees and dues, members who

wished to fly were required to rent an airplane from the club on an hourly basis.

The club's regulations required pilots to complete a "check flight" with a "check pilot" in certain circumstances before flying an airplane belonging to the club, and also provided that only persons certified by the Civil Aeronautics Administration as flight instructors were authorized to give flight instruction in club airplanes. Lists of locally available check pilots and instructors were maintained by the club. Neither check pilots nor flight instructors had contractual arrangements with the club or received compensation from it (Pet. App. 3a). The president of the club was responsible for determining the suitability of equipment and the qualifications of members for all flight operations; consequently, he had authority to disapprove any particular flight (Pet. App. 4a).

A member of the club wishing to receive instruction or to make a check flight would select an instructor or check pilot from the list and make his own arrangements with the person selected. The usual pay for an instructor or check pilot was three dollars per hour (Pet. App. 3a).

Petitioner was a technical sergeant in the Air Force, and was assigned to Castle Air Force Base as a fire-fighting supervisor. He had joined the Aero Club and had taken instruction from civilian flying instructors and from Sgt. Everett C. Graves, who was both president of the club and a qualified flight instructor. On one occasion—in May 1959—Sgt. Graves had approved a flight by petitioner with Lt. Maurice Hammack, who was a member of the club and a rated mili-

tary pilot, but who was not an instructor (Pet. App. 6a–7a, 8a–9a).

On the afternoon of June 6, 1959, after being released from duty, petitioner arrived at the club field (some three miles from Castle Air Force Base) hoping to arrange for a solo flight under the supervision of Sgt. Graves. Sgt. Graves was not there, however. Petitioner asked Lt. Hammack to accompany him on a flight, and Hammack agreed. Petitioner then rented a club airplane, and the two took off. The airplane crashed as a result of the negligence of Hammack, and petitioner was injured.

2. Petitioner brought this action against the United States under the Federal Tort Claims Act, alleging that his injuries resulted from Hammack's negligence in flying the airplane. The government asserted, *inter alia,* that Lt. Hammack was not flying the airplane as an employee of the club or of the United States.

At trial petitioner offered no testimony, club records or other evidence to indicate that Hammack was actually employed by the club or that he believed Hammack to be so employed. When asked on cross-examination whether Hammack "worked" at the club, petitioner replied (Tr. 125):[1] "Well, I don't believe that anybody actually worked at the club full time, except maybe Sgt. Tilson * * *." In response to a question whether Sgt. Graves or anyone else was working for the club on a part-time basis, petitioner

[1] "R." references are to Volume I of the Record as reproduced in the court of appeals, and "Tr." references are to the transcript of testimony which form Volumes II and III of that Record.

replied that Sgt. Graves was president of the club (*ibid.*).

The district court found that Lt. Hammack's negligence was the proximate cause of petitioner's injuries, but that Hammack was not acting as an agent of the Aero Club at the time of the flight, and was not, therefore, flying the airplane as an employee of the United States (Pet. App. 9a). When counsel for petitioner requested the court "to make a ruling on the issue of ostensible agency as created by Sergeant Graves in Lieutenant Hammack," the court stated, "I don't find any negligence on the part of Sergeant Graves" (Tr. 221, 222). Judgment was accordingly entered in favor of the United States (Pet. App. 11a).

The court of appeals affirmed unanimously with an opinion by Judge Browning. It ruled that the question whether a person is an "employee of the Government" within the meaning of the Tort Claims Act was to be determined by federal law, but that federal law on that subject incorporated principles of State law regarding the doctrine of *respondeat superior*. The court concluded that there was "substantial support" in the record for the district court's finding that Lt. Hammack was not an employee of the Aero Club, and it sustained the district court's determination (Pet. App. 2a, 5a).

ARGUMENT

The district court found that the pilot whose negligence caused petitioner's injury was not flying the airplane as an employee of the Castle Air Force Base Aero Club or as an employee of the United States, and the court of appeals unanimously sustained that

finding.[1] Recognizing that there would be no occasion for further examination of the concurrent finding of the two courts below (Pet. 10), petitioner seeks instead to have this Court review this case to determine the responsibility of the United States under the Federal Tort Claims Act for the acts of "ostensible" or "apparent" agents. The "ostensible agency" questions, however, are neither presented by the record nor, if presented, would they warrant review by this Court.

1. Rather than supporting petitioner's claim that he relied on Lt. Hammack's "ostensible" authority, the record demonstrates that there was no suggestion that petitioner believed Hammack to be an employee of the Aero Club.[2] The court was not requested to make any findings as to whether petitioner acted in mistaken reliance on Hammack's capacity or whether he was justified in so doing. Indeed, the district court's findings expressly negate any contention that any officer or employee of the club negligently held Hammack out as an employee or agent of the club.[3]

Petitioner's claim is essentially that the concepts of "ostensible authority" and justifiable reliance be carried over from their traditional sphere of contractual obligations to vicarious tort liability as a matter

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[1] Indeed, petitioner's own testimony suggests strongly that he was fully aware that Hammack was not employed by the club in any capacity. See p. 5, *supra*.

[2] When asked by counsel for petitioner to "make a ruling on the issue of ostensible agency as created by Sergeant Graves in Lieutenant Hammack," the district court ruled, "I don't find any negligence on the part of Sergeant Graves." P. 6., *supra*.

of federal law under the Federal Tort Claims Act (Pet. 11–15). But in order to hold a principal liable for the tort of an "ostensible agent" a plaintiff must establish that he has relied to his detriment upon the apparent authority of the agent. Restatement, *Agency* 2d, Sec. 219(2)(d). Even if the record had established that petitioner believed Lt. Hammack to be an employee of the United States, it is difficult to see how that reliance contributed to petitioner's injury. Petitioner retained Lt. Hammack not because he believed him to be an employee of the club, but because he believed him to be an instructor rather than a check pilot (Tr. 115–116). And, as the court of appeals found, neither check pilots nor instructors were agents of the club, and consequently, neither were employees of the United States (Pet. App. 4a–5a).

Moreover, the responsibility of the United States under the Tort Claims Act is limited to injuries "caused by the negligent or wrongful act or omission of any employee of the Government" (p. 2, *supra*), and it is, therefore, extremely doubtful whether this language would permit a finding of liability for the acts of a person who is not an actual employee. No court has yet so held and the decision below—to the extent that it impliedly rejects such a claim—does not conflict with that of any other court of appeals.

2. Petitioner contends alternatively that the question of who is a federal employee for purposes of the Tort Claims Act should be decided by reference to the law of the State where the injury occurred (Pet. 15–18). Every court of appeals which has considered this issue has ruled that that question, as distinct from the question of whether a federal

employee is acting within the scope of his employment, is governed by federal law. *E.g., United States* v. *Hainline,* 315 F. 2d 153, 156 (C.A. 10), certiorari denied, 375 U.S. 895; *Blackwell* v. *United States,* 321 F. 2d 96, 98 (C.A. 5). And this Court, while not discussing the issue of choice of law, recently decided a case requiring it to determine who is a federal employee without any reference to State law. *State of Maryland for the use of Levin* v. *United States,* No. 345, this Term, decided May 3, 1965. Since the Tort Claims Act limits the liability of the United States to the acts or omissions of employees of the government, and then defines that term (pp. 2–3, *supra*), the statute lends no support to the suggestion that Congress intended to subject the United States to liability for the conduct of non-employees, even if State law recognizes such liability.

In any event, the law of California does not appear to be materially different from federal law on the issue of tort liability for ostensible agents. The California cases make it clear that California applies the doctrine of ostensible agency to torts only in "peculiar and exceptional circumstances" where "it is necessary to invoke an estoppel to prevent manifest injustice from being done." *Barton* v. *Studebaker Corporation of America,* 46 Cal. App. 707, 723, 189 Pac. 1025, 1031. California does not impose tort liability for the acts of an "ostensible agent" unless the principal has held him out to be an agent "through fault or negligence." *Donnelly* v. *San Francisco Bridge Co.,* 117 Cal. 417, 421, 422, 49 Pac. 559, 560, 561. Since the district court found that Sgt. Graves was not negligent in

his conduct vis-à-vis petitioner and Lt. Hammack, there would be no liability under California law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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